Supreme Court U.S.
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No. 02-436

In The

Supreme Court of the United States

PICKENS MECHANICAL CONTRACTORS, INC.; HOWARD D. PICKENS AND SALLY M. PICKENS, HUSBAND AND WIFE,

Petitioners,

v.

FIRST ENTERPRISE BANK, OKLAHOMA CITY, OKLAHOMA

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioner Pickens Mechanical Contractors, Inc. is a small closely-held corporation formerly engaged in the mechanical contracting business. Petitioners Howard D. Pickens and Sally M. Pickens are married and have been and remain the officers and directors of Pickens Mechanical Contractors, Inc.

Respondent, First Enterprise Bank of Oklahoma City, Oklahoma is a banking corporation organized under the laws of the State of Oklahoma with its four branches and principal place of business located in Oklahoma City, Oklahoma. There is no parent or publicly held company that owns 10% or more of First Enterprise Bank's stock.

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12 O.S. 1991, §2013(C) ..... *passim*

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MISSTATEMENTS OF FACT AND LAW

Petitioners contend the decision of the "state courts of last resort conflict with decisions of United States Courts of Appeal." (Petition for Writ of Certiorari, p. 3). The federal cases Petitioners cite have no bearing on whether Petitioners' counterclaims could be used in the District Court of McClain County in the State of Oklahoma. None of the cited cases involve the application of a state procedural law like Oklahoma's, 12 O.S. 1991, §2013(C), prescribing the use of all counterclaims brought in Oklahoma's state courts. The Federal Rules of Civil Procedure do not contain a provision similar to 12 O.S. 1991, §2013(C) which provides, in part:

> Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

The Oklahoma Court of Civil Appeals opinion addressing Petitioners' Equal Credit Opportunity Act (hereafter "ECOA"), 15 U.S.C. §§1691-1691f, counterclaims rests on Oklahoma state law, 12 O.S. 1991, §2013(C), rests on Oklahoma case law, *Bank of Oklahoma v. Briscoe*, 911 P.2d 311 (Okla.Ct.App. 1996), and is not in conflict with decisions of the United States Courts of Appeal.

Petitioners make numerous factual arguments concerning the merits of their ECOA counterclaims. The Oklahoma Court of Civil Appeals never reached the merits of the alleged ECOA violations because it first held Petitioners were barred from using those counterclaims for any purpose by application of 12 O.S. 1991, §2013(C).

Petitioners contend the "Oklahoma Civil Appeals Court and the Supreme Court of the State of Oklahoma

both ignored the federal case law as to Petitioners' rights . . ." (Petition for Writ of Certiorari, pp. 4, 6). Petitioners never mentioned or addressed Oklahoma's controlling procedural statute covering the use of counterclaims, 12 O.S. 1991, §2013(C), in either their Answer Brief to the Oklahoma Court of Civil Appeals or in their Petition for Certiorari to the Oklahoma Supreme Court. Respondent argued at the trial court level and again on appeal in state court that Petitioners' ECOA counterclaims could not be used for any purpose pursuant to 12 O.S. 1991, §2013(C). Petitioners never disputed the fact their ECOA counterclaims were time-barred before Respondent's claims arose and did not present on appeal any reason, constitutional or otherwise, why 12 O.S. 1991, §2013(C) was not applicable.

Petitioners suggest Respondent somehow violated the Equal Credit Opportunity Act by obtaining a mortgage on Petitioners' home. (Petition for Writ of Certiorari, pp. 6-7, 13-14). The Equal Credit Opportunity Act and the regulations written under the Act specifically permitted Respondent to obtain Petitioners' signatures on the home mortgage. 15 U.S.C. §1691d(a); 12 C.F.R. §202.7(d)(4).

STATEMENT OF THE CASE

Respondent filed a foreclosure action in the District Court of McClain County, State of Oklahoma, against Petitioners seeking judgment on a $300,000.00 promissory note, judgment on personal guarantees and foreclosure of a mortgage and security agreements. Petitioners filed counterclaims of estoppel/waiver, wrongful acceleration, fraud/constructive fraud, bad faith and violation of the

Equal Credit Opportunity Act. After a bench trial the trial court entered judgment for Petitioners on all of their counterclaims and entered judgment against Respondent on all of its claims. The trial court awarded Petitioners actual damages in the approximate amount of $1,500,000.00 and punitive damages in the approximate amount of $500,000.00.

Respondent appealed the judgment to the Oklahoma Supreme Court, which assigned the case to the Oklahoma Court of Civil Appeals. The Oklahoma Court of Civil Appeals, in an unpublished opinion, reversed the trial court's judgment and remanded the case with directions to enter judgment in favor of Respondent on its claims and against the Petitioners on their counterclaims. In its opinion the Oklahoma Court of Civil Appeals generally found that the trial court erred in its application of Oklahoma law to the facts and that Petitioners produced no evidence or insufficient evidence to sustain their burden of proof on the claims of estoppel/waiver, wrongful acceleration, fraud/constructive fraud and bad faith.

The Oklahoma Court of Civil Appeals applied Oklahoma's procedural statute on the use of counterclaims, 12 O.S. 1991, §2013(C), to the undisputed facts and ruled that Petitioners were barred from using the Equal Credit Opportunity Act counterclaims for any purpose because their counterclaims were time-barred before Respondent's claim arose.

Petitioners then filed their Petition for Certiorari with the Oklahoma Supreme Court. The Oklahoma Supreme Court denied the Petition for Certiorari.

REASONS FOR DENYING THE WRIT

Petitioners' arguments in support of certiorari fail for two simple reasons. First, Petitioners' constitutional challenges were neither properly presented to nor addressed by the Oklahoma Court of Civil Appeals or the Oklahoma Supreme Court. Second, the Oklahoma Court of Civil Appeals opinion rests on independent and adequate state grounds.

I. Jurisdiction Will Not Lie Because The Federal Questions Were Not Raised Below.

In order for jurisdiction to lie pursuant to 28 U.S.C. §1257, a substantial federal question must have been properly raised in the state court proceedings. This Court has consistently refused to decide federal constitutional issues raised for the first time on review of a state court's decision. *Webb v. Webb,* 451 U.S. 493, 499, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981). This Court has long adhered to the rule in reviewing state court judgments under 28 U.S.C. §1257 that it will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to the state court that rendered the decision. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). Petitioners failed to properly present to the Oklahoma Court of Civil Appeals or the Oklahoma Supreme Court the constitutional issues which they now raise in their Petition for Writ of Certiorari.

Petitioners argue review should be granted because "unconstitutional discrimination against spouses of borrowers is being allowed and encouraged despite the Equal Credit Opportunity Act." Petitioners wholly failed to raise this "unconstitutional discrimination" argument to either

the Oklahoma Court of Civil Appeals or to the Oklahoma Supreme Court. Even in their Petition for Writ of Certiorari before this Court, Petitioners failed to make a "constitutional" argument as to why the ruling by the Oklahoma Court of Civil Appeals is infirm.

On appeal in state court the Petitioners made no constitutional attack on 12 O.S. 1991, §2013(C). Petitioners simply ignored this statute, which served as the basis for the Oklahoma Court of Civil Appeals ruling on Petitioners' ECOA counterclaims. Petitioners presented no argument on appeal in Oklahoma that a federal statute existed which would dictate how ECOA counterclaims are to be used in a state court action. ECOA's statute of limitations, 15 U.S.C. §1691e(f), is silent on the use of counterclaims.

On appeal in Oklahoma the Petitioners merely cited inapplicable decisions from federal courts addressing the use of ECOA counterclaims in actions filed in federal courts. On appeal in state court the Petitioners cited no authority and made no argument that the State of Oklahoma should ignore its own procedural statute, 12 O.S. 1991, §2013(C).

Petitioners contend they have been denied due process. Petitioners did not raise any constitutional claims or even mention the phrase "due process" in their Answer Brief to the Oklahoma Court of Civil Appeals or in their Petition for Certiorari to the Oklahoma Supreme Court.

When the highest state court is silent on a federal question, this Court will assume that the issue was not properly presented. *Adams, supra,* at 86, 117 S.Ct., at 1029. The Petitioners bear the burden of defeating this assumption by demonstrating that the state court had "a

fair opportunity to address the federal question that is sought to be presented here," *Webb, supra*, at 501, 101 S.Ct., at 1894. Petitioners have not met their burden of showing that the constitutional issues were properly presented on appeal in Oklahoma.

Petitioners have failed to show the Oklahoma appeals courts' failure to deal with the constitutional challenges was anything other than want of proper presentation. Because Petitioners failed to raise their federal constitutional claims in the state court proceedings and because the Oklahoma Court of Civil Appeals failed to rule on a federal issue, this Court should decline review.

II. The State Court Judgment Rests On Independent And Adequate State Grounds.

Consideration of any federal question, if found to exist, should be precluded by the existence of independent and adequate state grounds supporting the Oklahoma Court of Civil Appeals opinion. The Oklahoma Court of Civil Appeals decision to preclude Petitioners' ECOA counterclaims rests squarely on Oklahoma's procedural statute addressing the use of counterclaims, 12 O.S. 1991, §2013(C) which provides, in part:

> Where a counterclaim was barred by a statute of limitation before the claim of the opposing party arose, the barred counterclaim cannot be used for any purpose.

The decision also rests squarely on Oklahoma case law, *Bank of Oklahoma v. Briscoe*, 911 P.2d 311 (Okla.Ct.App. 1996) (where defendant's counterclaims were time-barred before plaintiff's claims arose, defendant was precluded by

12 O.S. 1991, §2013(C) from raising those counterclaims in defense of plaintiff's action against him).

Under traditional choice of law principles, the law of the forum state governs on matters of procedure. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10, 104 S.Ct. 1473, 1480 n. 10, 79 L.Ed.2d 790 (1984). The Oklahoma Supreme Court has recognized "laws of set-off, counterclaim and recoupment are generally procedural and relate to the remedy and not to the right." *Stephens v. Household Finance Corporation*, 566 P.2d 1163, 1165 (Okla. 1977). The use of Petitioners' ECOA counterclaims in Oklahoma state court was a procedural issue, properly determined under Oklahoma procedural law, 12 O.S. 1991, §2013(C).

Petitioners never disputed the following facts: their ECOA counterclaims arose on May 4, 1990; ECOA provides a two (2) year statute of limitations; their ECOA counterclaims must have been brought by May 4, 1992 or be time-barred; Respondent's claim on the note, mortgage and guarantees arose after April 1, 1994; and Petitioners' ECOA counterclaims/defenses were not filed until May 12, 1995. The Oklahoma Court of Civil Appeals merely applied the controlling Oklahoma statute addressing the use of counterclaims to the undisputed facts before it and concluded Petitioners' barred ECOA counterclaims could not be used for any purpose.

This Court has long adhered to the principle that it will not review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201 (1983). State law and practice are no less applicable when federal rights are in controversy than

when the case turns entirely upon questions of local or general law. *John v. Paullin*, 34 S.Ct. 178, 178-179, 231 U.S. 583, 585, 58 L.Ed. 381 (1913). Because the Oklahoma Court of Civil Appeals decision rests on adequate and independent state grounds, review by this Court is not warranted.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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